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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 678

SALVATORE MAUGERI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Salvatore Maugeri for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, respectfully shows:

STATEMENT OF THE CASE AND OF THE MATTER INVOLVED.

Salvatore Maugeri, the petitioner, together with Joseph Tocco and Joseph Barri, was accused, by an indictment containing two counts, of two violations of the *Jones-Miller Act,* 21 U.S.C.A., sec. 174. (R. 2.) The pertinent portions of each count of the indictment are as follows:

> "First Count. * * * That Salvatore Maugeri, Joseph Tocco and Joseph Barri * * * on or about the 12th day of August, 1944, at the City of Santa Cruz, County of Santa Cruz, State of California, within said Division and District, fraudulently and knowingly did conceal and facilitate the concealment of a lot of smoking opium in quantity particularly described as 105 tins containing approximately 700 ounces of smoking opium * * *." (R. 2.)
>
> "Second Count. * * * That on or about the 13th day of August 1944, at the City of Santa Cruz, County of Santa Cruz, State of California, within said Division and District, said defendants fraudulently and knowingly did facilitate the transportation of a lot of smoking opium, in quantity particularly described as 105 tins containing approximately 700 ounces of smoking opium * * *." (R. 2-3.)

Petitioner Maugeri was tried alone, by a jury, for said offenses, he having entered his pleas of "not guilty" (R. 6), and the jury returned a verdict finding him guilty of both counts of the indictment. (R. 12.) Petitioner moved the trial Court in arrest of judg-

ment on each count of the indictment (R. 13), which motion was denied (R. 17), and also moved for a new trial (R. 15), which motion was also denied. (R. 17.)

Thereupon the trial Court pronounced judgment and sentence that petitioner be imprisoned for the period of 10 years and pay a fine of $5,000 on the First Count of the Indictment; and that he be imprisoned for the period of 10 years and pay a fine of $5,000 on the second count of the indictment. (R. 17-18.) The judgment and sentence further provided as follows:

> "It Is Further Ordered that the sentence of imprisonment imposed by this Court on defendant on the Second Count of the Indictment commence and run at the expiration of the sentence of imprisonment imposed by this Court on defendant on the First Count of the Indictment." (R. 18.)

From the foregoing judgment and sentence petitioner duly appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 18), on the grounds, among others, (1) that the order directing the terms of imprisonment to run *consecutively* constituted a violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States and constituted double punishment for the same offense (R. 189-190), and (2) that there was no evidence to establish the offense set forth in the second count of the indictment. (R. 22.) *These were the only points urged on appeal.*

Respondent Circuit Court of Appeals, on October 20, 1945, rendered an opinion *reading in full* as follows:

> "Per Curiam: The judgment of the District Court is affirmed." (R. 197.)

The only evidence as to the events of August 12th and 13th was the testimony of the Government's chief witness Benedict Pocoroba (R. 25-81), a Federal narcotic undercover agent. This witness testified that for several months prior to August he resided in Santa Cruz and met and became friendly with petitioner Maugeri, Tocco and Barri: that he rented a cabin in Santa Cruz (R. 27); all the events of August 12th and 13th took place in Pocoroba's cabin. Pocoroba's testimony as to these events follows:

> "* * * After 11:00 o'clock on Saturday evening, August 12th, Joe Tocco and Joe Barri and myself being present, Maugeri came into the cabin carrying a pasteboard box covered by a newspaper. He gave it to Tocco, who put it on the floor. Maugeri then went away and came back a few minutes later with another box about the same size, also wrapped in newspaper, and Tocco received it. I then mixed a drink and gave it to Sam Maugeri. He drank it in a hurry and went away. Maugeri had no conversation with Tocco or Barri at this time and place. When Maugeri left he said to Tocco. 'I will pick you up at 5:00 o'clock." (R. 35.)

Here the witness testifies that Tocco and Barri opened the pasteboard boxes, took out and weighed

the cans of opium and packed them in suitcases; that these activities took until one o'clock in the morning of August 13. (R. 35-37.)

Then the witness testified as follows:

> "At about 3:30 somebody rapped at the door and Joe Tocco went to the door and opened it, and Sam Maugeri said, 'Let's get the grips and let's go.' Tocco was dressed; he hadn't undressed for the night, but he had taken his shoes off. Tocco then took the brown leather suitcase, Government's Exhibit 1 for Identification, and the blue overnight bag, Government's Exhibit 2 for Identification, and left the cabin. Barri and I remained in the cabin." (R. 38.)

There is no other evidence in the record as to the subsequent activities of petitioner, save the testimony of Pocoroba as to a conversation he had with petitioner on August 16 as follows:

> "A. I asked if he heard from the boys, and he said 'No', and he said, 'If I don't hear from them again I would be glad. They are certainly lousy. Joe Tocco was introduced to me by a friend of mine, and the others were lousy.' And I asked him where he took Joe Tocco and he said to Berkeley." (R. 42.)

The evidence disclosed that the entire transaction involved the same identical tins of opium, occurred at the same time and place and that the events set forth in count one as having occurred on August 12 and the events set forth in count two as having occurred on August 13 constituted one continuous unbroken occurrence, covering a period of 4½ hours.

As to this matter, it was and is petitioner's contention that where the concealment and facilitating of the transportation of narcotics constitutes one unbroken continuous transaction, in which the concealment is but an incident to the transportation, such facts constitute but one indivisible offense. Where there is but one continuous and indivisible offense the infliction of two penalities of imprisonment, the second term of imprisonment to start upon the completion of the first, constitutes double punishment and is a violation of the right guaranteed by the Fifth Amendment not to be placed in jeopardy twice for the same offense and constitutes a deprivation of liberty without due process of law in violation of the due process clause of the Fifth Amendment. When respondent Court affirmed the judgments it did so in violation of the provisions of the Fifth Amendment and its decision is in direct conflict with decisions of this Court and of other Federal Circuit Courts of Appeals as hereinafter set forth.

The record further discloses that there was no evidence at all to establish the offense of facilitating the transportation of opium as charged in count two of the indictment save and except the extra-judicial statement of petitioner. The action of respondent Court in affirming the conviction on this count was in direct conflict with decisions from other Federal Circuit Courts of Appeals holding that a conviction cannot be sustained where the only proof of the *corpus delicti* is the extra-judicial statement of a defendant.

JURISDICTIONAL STATEMENTS.

(1) The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended. (28 *U.S.C.A.*, sec. 347.)

(2) The decision and judgment of respondent Court was rendered on October 20, 1945. (R. 197.) A petition for rehearing was denied by respondent Court on November 24, 1945. (R. 198.)

(3) The basis upon which it is contended that the Supreme Court has jurisdiction herein and the cases believed to support such jurisdiction are as follows:

(a) Where a Court denies to a defendant a right guaranteed by the Constitution or where the conviction of a defendant is affirmed in violation of a constitutional provision, this Court has jurisdiction to review by certiorari the action of the lower Court in such regard. This is the holding of this Court in such cases as *Powell v. Alabama*, 287 U. S. 45, 77 L. ed. 158; *Brown v. Mississippi*, 297 U. S. 278, 80 L. ed. 682.

(b) Where a misconstruction or misapplication of a statute or constitutional provision occurs, resulting in a departure from the usual course of proceedings in courts of justice, certiorari is the proper remedy to correct such error.

See:

United States v. Rizzo, 297 U. S. 530, 532, 80 L. ed. 844, 847.

(c) Where the decision of respondent Court is in conflict with applicable decisions of this Court or

where such decision is in conflict with applicable decisions rendered by Circuit Courts of Appeals in other circuits, this Court has jurisdiction on certiorari to review the action of respondent Court.

See:

Dept. of Treasury v. Ingram-Richardson Mfg. Co., 313 U. S. 252, 253, 85 L. ed. 1313, 1315.

(d) Where the question is of material importance relating to the construction of a statute or the application of a constitutional provision, this Court can review the question on certiorari.

See:

Federal Trade Com. v. Raladam Co., 316 U. S. 149, 150, 86 L. ed. 1336, 1339.

THE QUESTIONS PRESENTED.

The questions presented and raised by this petition are as follows:

1. Where an indictment charges the commission of two offenses as being in violation of one statute of the United States and the evidence discloses but one continuous, indivisible transaction, is not the infliction of a term of imprisonment for each offense charged, said sentences to run *consecutively*, a violation of the double jeopardy clause of the Fifth Amendment, and does not the infliction of the second penalty constitute a deprivation of liberty without due process of law?

2. Where the matters and things denounced by the Jones-Miller Act (21 U.S.C.A. sec. 174) which reads in part as follows:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or *receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug* after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years."

are done in a continuous sequence, all as part of one and the same transaction, does not such continuous action, constitute but one offense?

3. Was not the action of respondent Court in affirming the conviction on the second count of the indictment in conflict with comparable decisions of Federal Circuit Courts of Appeals from other circuits, where there was no evidence at all to establish such offense save an alleged extra-judicial admission of the defendant?

IMPORTANCE OF THE QUESTIONS INVOLVED.

The questions involved are of greater importance than merely the incarceration of petitioner. The Fifth Amendment acts as a bar against double jeorpardy and directs that no person shall be punished twice for the same offense. This precise question, to our

knowledge, has never been directly passed upon by this Court, and a decision of this Court embracing a proper construction of the Fifth Amendment in relation to the facts involved is of paramount importance to the future guidance of all Courts, state and federal, in every instance where this right guaranteed by the Fifth Amendment is invoked.

This Court has never construed the provisions of the Jones-Miller Act in so far as setting forth whether the various things denounced therein at all times constitute separate offenses or whether, if done in an unbroken sequence, they constitute but one offense. A decision by this Court is of paramount importance in governing future prosecutions under this Act and under all other acts containing a series of prohibited activities alleged in the disjunctive.

POINTS RELIED ON FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

It is petitioner's contention:

First, that he was denied the benefits and convicted and sentenced in violation of the provisions of the Fifth Amendment to the Constitution of the United States in that the action of the lower Court, sustaining the imposition of consecutive sentences and judgments on both counts of the indictment, constitutes double jeopardy and double punishment for but one and the same offense. The opinion of the Circuit Court of Appeals unholding such action of the trial Court is contrary to comparable decisions

of this Court and of many other Circuit Courts of Appeals, such as the cases of *Ex Parte Nielsen,* 131 U. S. 176, 33 L. ed. 118; *Schroeder v. United States,* (CCA-2), 7 Fed. (2d) 60; *Copperthwaite v. United States,* (CCA-6), 37 Fed. (2d) 846; *Morgan v. United States* (CCA-4), 294 Fed. 82; *Miller v. United States,* (CCA-6) 300 Fed. 529.

Second, that the opinion of the Circuit Court of Appeals, in effect holding that the evidence established two distinct offenses whereas it disclosed but one continuous and indivisible transaction, is contrary to comparable decisions of this Court and of other Circuit Courts of Appeals, such as the cases in the preceding paragraph cited.

Third, that the opinion of the Circuit Court of Appeals, in effect holding that an extra-judicial statement of a defendant, standing alone, is sufficient to establish an offense, is in direct conflict with comparable decisions of other Circuit Courts of Appeals such as the cases of *Ryan v. United States,* 99 Fed. (2d) 864, and *Goff v. United States,* 257 Fed. 294.

Fourth, that each of the matters in effect passed upon in the opinion of the Circuit Court of Appeals is an important question of general law and decided in a way not tenable and in conflict with the weight of authority.

For the reasons herein stated petitioner respectfully prays that this Honorable Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to the end that the ques-

tions involved may be fully presented and argued and justice done in the premises.

Dated, San Francisco, California,
December 12, 1945.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioner.

SOL A. ABRAMS,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hearby certify that I am counsel for petitioner in the above entitled cause and that, in my judgment, the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
December 12, 1945.

LEO R. FRIEDMAN,
Attorney for Petitioner.